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1965

IN THE

Supreme Court of the United States

No. [redacted] 117

SNYDER VOGEL AND SAM VOGEL, *Petitioners,*

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and TENNECO OIL COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Carl L. Shipley, on behalf of Snyder Vogel and Sam Vogel, prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of Oklahoma in the above entitled case.

OPINION BELOW

The opinion of the Supreme Court of the State of Oklahoma is No. 40525, dated February 9, 1965, and is set out *infra* in the appendix hereto, at page 1(a).

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, U.S. Code, Section 2101 and Rule 19, of this Court.

QUESTIONS PRESENTED

1. Whether participation in a case by a justice of a state Supreme Court—who writes the opinion in the case and is then subsequently suspended and impeached by the Legislature and indicted by a grand jury on charges of bribery—so taints and poisons the well-spring of justice that it is a deprivation of due process of law and a denial of equal protection of the laws as guaranteed by Amendment XIV of the Federal Constitution?

2. Whether there is a deprivation of due process of law and a denial of equal protection of the laws in a Corporation Commission case where a party has asserted violation of rights under Amendment XIV to the Constitution of the United States and similar provisions of the Constitution of Oklahoma, and where the Constitution of Oklahoma provides in terms:

> "The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts.
>
> In all other appeals from orders of the Corporation Commission the review of the Supreme Court shall not extend further than to determine * * * whether the findings and conclusions of the Commission are sustained by the law and substantial evidence."

But where the Supreme Court of Oklahoma nonetheless rules and decides that he,

> "controversy hinges upon the single question of whether there was substantial evidence to support the order entered",

thus ignoring the constitutional issues and applying the "substantial evidence" rule to a case where the plaintiff in error is entitled to an independent judgment on the facts under the cited provision of the Oklahoma Constitution?

3. Whether the establishment by the Oklahoma Corporation Commission of a 320-acre drilling and spacing unit for the production of gas and gas condensate from each of two common sources of supply in Section 35, Township 2 North, Range 9 East, Coal County, Oklahoma is such an unreasonable, arbitrary, and discriminatory restriction on the use of private property as to be a deprivation of due process of law and a denial of equal protection of the laws, as guaranteed by Amendment XIV to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent provisions of the Constitution of the United States are as follows:

> Amendment XIV, Section 1: "* * * Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article II of the Constitution of the State of Oklahoma reads in pertinent part:

> § 23. *Private property—Taking or damaging for private use.*—No private property shall be taken or damaged for private use, with or without

compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law.

§ 24. *Private property—Public use—Character of use a judicial question.*—Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. * * * When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

Article IX, Section 20 of the Constitution of the State of Oklahoma reads in pertinent part:

"The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial

only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment *as to both the law and the facts.*

In all other appeals from orders of the Corporation Commission the review of the Supreme Court shall *not* extend further than to determine whether the Commission has regularly pursued its authority and entered findings and conclusions of the Commission which are sustained by the law and substantial evidence. Upon review, the Supreme Court shall enter judgment either affirming or reversing the order of the Commission appealed from." (Emphasis supplied)

Pertinent provisions of the statutes of the State of Oklahoma relating to power and authority of the Corporation Commission to establish well spacing and drilling units are:

Sec. 87.1(a), Title 52, O.S.A.:

"To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes or to protect or assist in protecting the correlative rights of interested parties, the Commission, upon a proper application and notice given as hereinafter provided, and after a hearing as provided in said notice, shall have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source of supply, of oil or gas within the State of Oklahoma . . ."

Sec. 87.1(b), Title 52, O.S.A.:

"In establishing a well spacing or drilling unit for a common source of supply thereunder, the

acreage to be embraced within each unit and the shape thereof shall be determined by the Commission from evidence introduced at the hearing, ...

"The order establishing such spacing or drilling units shall set forth: (1) the outside boundaries of the surface area included in such order; (2) the size, form, and shape of the spacing or drilling units so established; (3) the drilling pattern for the area; which shall be uniform; and (4) the location of the permitted well on each such spacing or drilling unit. To such order shall be attached a plat upon which shall be indicated the foregoing information . . ."

Sec. 86.3, Title 52, O.S.A.:

"The term 'waste', as applied to gas, in addition to its ordinary meaning, shall include the inefficient or wasteful utilization of gas in the operation of oil wells drilled to and producing from a common source of supply, the inefficient or wasteful utilization of gas from gas wells drilled to and producing from a common source of supply; the production of gas in such quantities or in such manner as unreasonably to reduce reservoir pressure or unreasonably to diminish the quantity of oil or gas that might be recovered from a common source of supply; the escape, directly or indirectly, of gas from oil wells producing from a common source of supply into the open air in excess of the amount necessary in efficient drilling, completion or operation thereof; waste incident to the production of natural gas in excess of transportation and marketing facilities or reasonable market demand; the escape, blowing or releasing, directly or indirectly, into the open air, of gas from wells productive of gas only, drilled into any common source of supply, save only such as is necessary in the efficient drilling and completion thereof; and the unnecessary depletion or inefficient utilization of gas energy contained in a common source of supply . . ."

STATEMENT OF FACTS

Petitioners herein, Snyder Vogel and Sam Vogel, and their immediate family, own 50 acres of the minerals in SE/4 of Section 35, Township 2 North, Range 9 East, Coal County, Oklahoma, under lease to Tenneco Oil Company; in addition Snyder Vogel and Sam Vogel own 8 acres in the SW/4 of said section 35.

The Tenneco Oil Company drilled its Sarkeys No. 1 Well in the SE/4 of the said Section 35 (R., Ex. 9A), which encountered two separate common sources of supply of gas and gas condensate, the first being the Basal McLish Sand at the approximate depth of 8,038 feet below the surface, said sand being about 20 feet in thickness (R. 33), and a second and separate reservoir in the Oil Creek Sand at the approximate depth of 8,231 feet, this second sand being approximately 60 feet in thickness (R. 32, 33).

The said Tenneco Oil Company Sarkeys No. 1 Well, described above, is more specifically located in the NW/4 of the SE/4 of the SE/4 of said Section 35, a distance of 990 feet west of the east line and 1650 feet east of the west line of the SE/4 of Section 35.

After drilling and completing the Sarkeys No. 1 Well, Tenneco Oil Company filed an application with the Oklahoma Corporation Commission requesting that all of the S/2 (320 acres) of Section 35, Township 2 North, Range 9 East, Coal County, Oklahoma, be declared a drilling and spacing unit for each of the two above referred to common sources of supply.

Petitioners herein participated in the hearing on said application before the Oklahoma Corporation Commission and protested the granting of the application and the establishment of the drilling and spacing

unit for each of the two common sources of supply on the ground that the 160 acres in the SW/4 of said Section 35 will not produce gas and gas condensate in the two reservoirs, and the 320 acre spacing and drilling unit would be a dilution of the income that petitioners are entitled to receive from the production from this well.

If the drilling and spacing unit established by the Oklahoma Corporation Commission had been confined to the 160 acres of the SE/4 of the said Section 35, the mineral ownership of the petitioners would amount to 50/160th. The establishment by the Commission of a 320 acre unit materially destroys the correlative rights and property rights of petitioners in that it reduces their mineral ownership to 58/320ths, or 29/160th, of the total 1/8th production, a reduction in their correlative rights of approximately 40%, which can amount to a substantial sum of money in view of the productive history of income from the McLish and Oil Creek formations in the State of Oklahoma. Petitioners expressly challenged the order of the Oklahoma Corporation Commission in their petition in error to the Supreme Court of Oklahoma on the ground that said order denied them the rights guaranteed by Amendment XIV to the Constitution of the United States, and that said order constituted a taking of their property in violation of the provisions of Sections 23 and 24 of Article II of the Constitution of the State of Oklahoma.

As indicated in the opinion of the Supreme Court of Oklahoma included in this petition in the appendix at page 1(a), the Court recognized that the petitioners had presented two propositions for judicial review of the order of the Oklahoma Corporation Commission, to

wit: first, alleged violation of their rights under both the Constitution of the United States and the Constitution of Oklahoma, and as a second proposition, the lack of substantial evidence to support the spacing and drilling order entered by the Oklahoma Corporation Commission. As indicated in said opinion, the Supreme Court of Oklahoma erroneously and arbitrarily and in deprivation of the rights guaranteed to petitioners by Amendment XIV to the Constitution of the United States and the cited provisions of the Constitution of the State of Oklahoma wholly ignored and avoided constitutional questions raised by petitioners, as follows:

> "The claimed violation of the appellants' constitutional rights is therefore based upon the same contention advanced in Proposition Two, supra, namely, that the evidence is insufficient to justify the order entered. * * * This controversy hinges upon the single question of whether there was substantial evidence to support the order entered." (Appendix 1(a))

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

Petitioners respectfully submit and verily believe that the facts and matters of record in their case call inexorably for this Court to grant review and assume jurisdiction on writ of certiorari, in the exercise of its sound judicial discretion, since the circumstances of petitioners' case fit into the considerations governing review on certiorari as set forth in Rule 19 of this Court's rules, which provide in pertinent part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither

controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court * * *".

The special and important reasons justifying review on writ of certiorari are as follows:

1. The opinion of the Supreme Court of the State of Oklahoma in *Vogel et al.* v. *Corporation Commission et al.*, No. 40526, decided February 9, 1965, and which petitioners herein request be reviewed on writ of certiorari, was written by Justice N. B. Johnson of that court, who has since been indicted by an Oklahoma County Grand Jury for bribery on March 27, 1965, and suspended from his office and impeached by the Oklahoma State Legislature. Although Justices Halley, Jackson, Williams, Irwin and Berry concurred in the opinion, and Justice Blackbird dissented, petitioners respectfully submit and verily believe that the participation by Justice Johnson in said opinion so tainted and poisoned the well-spring of judicial impartiality as to be a denial of the equal protection of the laws and a deprivation of the due process of law guaranteed to petitioners by Amendment XIV to the Constitution of the United States. The articles of impeachment against Justice Johnson adopted by the House of the Oklahoma Legislature on March 24, 1965 and accepted by the Senate on March 29, 1965, charge him with accepting a $7,500 bribe in *Selected Investment Corp.* v. *Oklahoma Tax Commissioner*, and a $2,500 bribe in *Oklahoma Co.* v. *O'Neill* to influence his opinion. Just as a

party in a civil jury proceeding is entitled to a jury instruction that all the testimony of a witness who lies on one material matter may be disregarded, so petitioners believe an analogous principle should vitiate this opinion of Justice Johnson. Certainly the expanding concept of due process includes the right of petitioners to have their cause decided by the Supreme Court of Oklahoma by justices, each of whom is free from suspicion and from subconscious fear of reprisal or hope of favor, with minds and consciences open and disposed to be persuaded by the law and the facts of record presented for decision. Due process is more than "that inocuous generality" referred to by Justice Holmes in *Atkins* v. *Children's Hospital*, 261 U.S. 525 (1923). If a grand jury impaneled pursuant to the laws of the State of Oklahoma had probable cause to believe that the allegations of bribery and other illegal conduct made against Justice Johnson were supported by sufficient evidence to justify an indictment, and the Legislature of Oklahoma saw fit to suspend him from office on March 29, 1965, and institute impeachment proceedings against Justice Johnson, this court has no fair alternative under the 14th Amendment to granting a writ of certiorari herein to consider the relationship between the due process clause and the assumption that the judicial process in the various states must be free from any taint of corruption, bias, or impropriety. This court has previously determined that inasmuch as due process implies a tribunal both impartial and mentally competent to afford a hearing, it follows that the subjection of a defendant's liberty or property to the decision of a court, the judge of which has a direct, personal, substantial pecuniary interest in rendering a verdict against him, is violative of the 14th Amendment. *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Jordan* v.

Massachusetts, 225 U.S 167, 176 (1912). In like manner, this court has held that the attribute of impartiality is lacking whenever a court is dominated by a mob. *Frank* v. *Mangum*, 237 U.S. 309, 335 (1915). Due process "requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice, which lie at the base of our civil and political institutions." *Buchalter* v. *New York*, 319 U.S. 427, 429 (1943). In the context of criminal proceedings, this Court has said

> "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. * * * What is fair in one set of circumstances may be an act of tyranny in others." *Snyder* v. *Massachusetts*, 291 U.S. 97, 116, 117 (1934).

Due process should contemplate a state judiciary not only free from corruption and partiality in fact, but free from the appearance of corruption and partiality. So far as counsel for petitioners can ascertain, this aspect of due process is a federal question of substance not heretofore determined by this Court. In such cases as *WKAT* v. *Federal Communications Commission*, 258 F. 2d 418; *WKAT, Inc.* v. *FCC*, 200 F. 2d 375; *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 541; *Massachusetts Bay Telecasters* v. *FCC*, 261 F. 2d 551; *Hazel-Atlas Co.* v. *Hartford Co.*, 300 U.S. 238, it has been determined that ex parte attempts to influence members of Federal administrative agencies so vitiate the proceedings as to require a new hearing.

> "Surreptious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our

system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision." *WKAT, Inc.* v. *FCC, supra.*

By analogy, the above decisions strongly suggest that this Court should in the exercise of its sound judicial discretion review the decision of the Supreme Court of Oklahoma on writ of certiorari, and send it back for re-decision without the participation of Justice Johnson. If he accepted bribes to influence decisions in other cases, how do plaintiffs know he did not to their prejudice exercise a prejudicial influence in their case?

2. Although this Court has ruled that the due process clause of the 14th Amendment does not control the mere forms of procedure in State courts or regulate practice therein, *Holmes* v. *Conway,* 241 U.S. 624, 631 (1916); *Louisville & M.R. Co.* v. *Schmidt,* 177 U.S. 230, 236 (1900), this Court has recognized that a state is only free to regulate the procedure of its Courts in accordance with its own conception of policy and fairness so long as it does not offend "some principle of justice so rooted in the conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934); *Weste* v. *Louisiana,* 194 U.S. 258, 263 (1904); *Chicago B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226 (1897); *Jordan* v. *Massachusetts,* 225 U.S. 167, 176 (1912). See also *Angel* v. *Bullington,* 330 U.S. 183 (1947). It is implicit in the due process clause of the 14th Amendment that a state Supreme Court is bound to follow the provisions of its own state Constitution, and that those provisions must be consistent with the provisions of the federal constitution, just as federal administrative agencies are bound to follow the rules and regulations they impose upon themselves. *Service* v. *Dulles,* 354 U.S. 363.

Article IX, Section 20 of the Constitution of Oklahoma reads in pertinent part:

> "The Supreme Court's review of appealable orders of the Corporation Commission *shall* be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court *shall* exercise its own independent judgment *as to both the law and the facts.* (Emphasis added)
>
> In all other appeals from orders of the Corporation Commission, the review of the Supreme Court shall *not* extend further than to determine whether the Commission has regularly pursued its authority and whether entered the findings and conclusions of the Commission are sustained by the law and *substantial evidence.*" (Emphasis added)

Petitioners herein timely raised federal and state constitutional questions in their petition in error filed with the Supreme Court of Oklahoma, and expressly challenged the Corporation Commission's order on the ground that it denied to them the equal protection of the laws as guaranteed by the 14th Amendment to the Constitution of the United States, and that the order entered by the Corporation Commission constituted a taking of their property in violation of Sections 23 and 24 of Article II of the Constitution of the State of Oklahoma. It is as clear as anything can be from a reading of plain language that under the Constitution of the State of Oklahoma the "substantial evidence" rule *only* applies in non-constitutional appeals from Corporation Commission orders. In accordance with the constitutional principle of due process, petitioners were entitled to have the Supreme Court of Oklahoma

follow the Oklahoma Constitution's mandatory language to the effect that the Oklahoma Supreme Court,

> "*shall* exercise its own independent *judgment* as to *both the law and the facts*"

in petitioner's case. That the Supreme Court of Oklahoma failed and refused to do so is plain on the face of its opinion cited in the appendix hereto at page 1(a), which states in pertinent part:

> "The argument advanced by appellants in support of Proposition One is that there is a taking of appellants' property in violation of Sections 23 and 24 of Article 2 of the Constitution of Oklahoma and in violation of the 14th Amendment to the Constitution of the United States because there is insufficient evidence 'in the record justifying the entry of the order creating drilling and spacing units one mile wide east and west in view of the facts in this case'. * * * The claimed violation of the appellants' constitutional rights is therefore based upon the same contention advanced in Proposition Two, supra, namely, that the evidence is insufficient to justify the order entered. * * * This controversy hinges upon the single question of whether there was substantial evidence to support the order entered."

Petitioners respectfully submit that application of the "substantial evidence" rule to this case is *not* an independent judgment by the Supreme Court of Oklahoma "as to both the law and the facts" of the case. The two paragraphs of the Oklahoma Constitution cited hereinabove clearly contemplate a distinction between the type of review given constitutional and non-constitutional cases. And a state court may not avoid deciding federal questions and thus defeat jurisdiction of this Court by putting forward non-federal grounds for

decision. *Wolfe* v. *State of North Carolina*, 364 U.S. 177. Previous decisions of the Supreme Court of Oklahoma on this point are couched in a negation in terms, which in effect nullify the plain meaning of the Oklahoma Constitution. For example, in *Mee* v. *Corporation Commission* (Okla. 1956), 293 P. 2d 593, the Oklahoma Court said:

> "The rule is well established that if an Order of the Corporation Commission appealed from is found to be supported by substantial evidence, it will be affirmed by this Court."

In *Woody* v. *State Corporation Commission*, (Okla.) 265 P. 2d, 1102, 1106, the Supreme Court of Oklahoma stated:

> "That * * * in the orderly administration of law we must indulge the presumption that the Commission's order is just, reasonable and correct * * *".

In *Anderson-Pritchard Oil Corporation* v. *Corporation Commission*, 205 Okla. 672, 241 P. 2d 363, the second syllabus by the Court reads:

> "Upon an appeal from an Order of the Corporation Commission asserting a violation of the rights of parties under the State of Federal Constitution, this Court will exercise its own independent judgment as to both the law and the facts, as provided by Section 20, Article IX of the Oklahoma Constitution, and will examine the entire record to determine whether the order is lawful and supported by competent and substantial evidence, and if found to be lawful and supported by the evidence, the order will be affirmed."

In *Carter Oil Company* v. *State*, 240 P. 2d 787, the Supreme Court of Oklahoma ruled:

> "Here where the order complained of hinges on asserted constitutional rights, the Court is author-

> ized to exercise its own independent judgment as to both the law and the facts. * * * The full consideration of the record unerringly leads to the conclusion that the order here is not supported by any substantial evidence, and is therefore contrary to law."

It is significant to note that in interpreting its own constitutional responsibilities the Supreme Court of Oklahoma substituted the phrase "authorized to exercise its own independent judgment" for the phrase "shall exercise its own independent judgment," the mandatory language contained in the Oklahoma Constitution. It is also plain from reading the cited language of the Carter Oil Company case that the Supreme Court of Oklahoma has persisted in misconstruing its responsibility to exercise its independent judgment as to the facts, as well as the law, in Corporation Commission cases involving asserted constitutional rights, and wrongly relying instead on the "substantial evidence" rule, which under the *Mee* decision referred to hereinabove simply would require the affirmation of a Corporation Commission decision, whether or not the Supreme Court agreed with its findings of fact and conclusions, if the Commission's decision is supported by substantial evidence, all based upon the Supreme Court's indulgence of the presumption that the Corporation Commission's orders are just, reasonable and correct. Just as this Court has held that the duty rests upon itself to decide for itself facts or construction upon which federal constitutional issues rest, *Kern-Limerick* v. *Scurlock,* 347 U.S. 110, so the Supreme Court of Oklahoma has a similar duty, which cannot be discharged by delegation to the Corporation Commission.

Petitioners respectfully submit and verily believe that it is a deprivation of due process of law and a

denial of the equal protection of the laws under the 14th Amendment for the Supreme Court of Oklahoma to fail and refuse to make *independent findings of fact* and conclusions of law respecting the prevention of waste of gas and protecting the correlative rights of interested parties in establishing a well-spacing and drilling unit for the two common sources of supply discovered in Tenneco Oil Company's Starkeys No. 1 Well, which encountered gas and gas condensate in both the Basal McLish Sand and Oil Creek Sand at the location NW/4 of the SE/4 of the SE/4 of Section 35, Township 2 North, Range 9 East, Coal County, Oklahoma, but instead accepting on the basis of "substantial evidence," the order of the Corporation Commission in creating one drilling and spacing unit of 320 acres, consisting of the entire S/2 of Section 35. An independent determination by the Supreme Court of Oklahoma on the basis of evidence of record, based on the Court's own independent findings of fact and conclusions, with respect to the establishment of a proper well-spacing and drilling unit for common sources of supply under the said acreage, to prevent waste, all as provided in Sections 87.1(a) and (b), Title 52, Oklahoma Statutes Annotated, might have resulted in an entirely different decision insofar as the property rights of petitioners are concerned.

Petitioners verily believe this is a special and important reason for granting certiorari in this cause, as the opinion of the Supreme Court of Oklahoma in *Vogel et al.* v. *Corporation Commission et al.,* No. 40526, decided February 9, 1965, was not only decided in a way probably not in accord with applicable decisions of this Court, but also ignored a Federal constitutional question of substance not heretofore determined by this Court, i.e., that the Supreme Court of

Oklahoma cannot ignore the provisions of the Constitution of Oklahoma requiring an independent decision on the law and the facts in Oklahoma Corporation Commission cases wherein parties assert federal constitutional rights.

3. Since 1886, when Chief Justice Waite, in the *Railroad Commission cases,* 116 U.S. 307, warned that

> "This power to regulate is not a power to destroy; the State cannot do that in law which amounts to a taking of property for public use without just compensation or without due process of law",

this Court has tended to treat "due process of law" and "just compensation" as equivalents. In *Chicago M. & St. Paul R. Co.* v. *Minnesota,* 134 U.S. 418, 458 (1890), this Court ruled:

> "the question of the reasonableness of a rate * * * involving as it does the element of reasonableness both regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself without due process of law * * *".

(See also *Reagan* v. *Farmers Loan & Trust Co.,* 154 U.S. 362). The judicial determination of railroad rates is not substantially different in character from the judicial determination of well-drilling and spacing units. The cited portions of Article IX, Section 20 of the Constitution of Oklahoma, referred to hereinabove, seem plainly to point in this direction. Although

the *Reagan* case supra, and *Interstate Commerce Commission* v. *Illinois C. R. Company,* 215 U.S. 452, 470 (1910), make it clear the courts are not authorized to usurp merely administrative functions, there is nothing in the federal constitution or decisions of this Court which would prohibit a state in its constitution from requiring a judicial determination in constitutional cases of such administrative matters as the creation of a proper well-drilling and spacing unit as is provided under the statutes of Oklahoma.

In oil and gas cases, this Court has ruled numerous times that states have authority to pro rate production to prevent waste, to prohibit wasteful conduct in behalf of the owners of gas in a common reservoir, or because of the public interest involved. *Thompson* v. *Consolidated Gas Utilities Corporation,* 300 U.S. 55 76-77 (1937), citing *Ohio Oil Company* v. *Indiana* (No. 1) 177 U.S. 190 (1900); *Limdsley* v. *Natural Carbonic Gas Company,* 220 U.S. 61 (1911); *Oklahoma* v. *Kansas Natural Gas Company,* 221 U.S. 229 (1911). This court has determined it is neither repugnant to the due process clause nor inconsistent with the federal constitution for a state statute to define waste as including economic waste and limiting a producer to taking only such proportion of oil that may be produced from a common source without waste as the production of his well bears to the total production of the common source. *Champlin Refining Company* v. *Corporation Commission,* 286 U.S. 210 (1932). Indeed this Court has ruled that the combination of factors upon which a system of pro-ration is based is a question for administrative and not judicial judgment, especially where a decision must be based on conflicting expert testimony in the domain of oil and gas well knowledge, where judgment is necessarily beset by the neces-

sity of inferences bordering on conjecture even for those learned in the art. *Railroad Commission* v. *Oil Company,* 310 U.S. 573 (1940). See also *Railroad Commission* v. *Oil Company,* 311 U.S. 570 (1941) and *Railroad Commission* v. *Humble Oil and Refining Company,* 311 U.S. 578 (1941). However, the above cited cases did not involve a state constitutional provision requiring independent judicial findings in constitutional cases. This line of reasoning is not applicable to the case at bar, since one of the central questions is whether or not the Supreme Court of Oklahoma is required by the Oklahoma Constitution to make an independent judicial determination of the law and the facts under the applicable state statutes, regardless of what independent decision the Corporation Commission might have made or might make on the same record. But even if it be assumed that the Supreme Court of Oklahoma can meet its obligation under the Oklahoma Constitution by simply applying the "substantial evidence" rule to the independent determinations of the Oklahoma Corporation Commission, this Court can and should properly review the entire record to see whether or not the petitioners have suffered a taking of private property for private benefit in violation of their rights under the 14th Amendment of the Constitution of the United States. *Thompson* v. *Consolidated Gas Utilities Corporation,* 300 U.S. 55 (1937). If the Oklahoma Corporation Commission by establishing one 320-acre drilling and spacing unit consisting of the S/2 of Section 35, Township 2 North, Range 9 East, Coal County, Oklahoma, for the production of natural gas and natural gas condensate in the Basal McLish Sand at 8,038 feet below the surface and in the Oil Creek Sand at 8,231 feet below the surface, as separate reservoirs, instead of

creating a unit not in excess of 160 acres, is so restrictive of the use of petitioners' private property as to be unreasonable, there is a "taking" without due process of law. *Pennsylvania Coal Company* v. *Mahon,* 260 U.S. 393 (1922). This must depend upon a review of the evidence of record before said Commission by this Court. In a somewhat parallel situation, this Court, in upholding zoning regulations limiting the height of buildings which may be constructed in a designated zone, has warned that similar regulations, if unreasonable, arbitrary, and discriminatory, may be held to deprive an owner of the profitable use of his property and hence to amount to a taking sufficient to require compensation to be paid for such invasion of property rights. *Welch* v. *Swasey,* 214 U.S. 91 (1909).

Apart from the question of responsibility of the Supreme Court of Oklahoma, under Article IX, Section 20 of the Constitution of Oklahoma, as interpreted by itself in such cases as *Rich* v. *Doneghey,* 71 Okla. 204, 177 Pack 86; *Grison Oil Corporation* v. *Corporation Commission,* 186 Okla. 548, 99 P. 2d 134; *Gulf Oil Corporation* v. *State,* 360 P. 2d 933; *Panhandle Eastern Pipeline Co.* v. *Corporation Commission,* 285 P. 2d 847; *Shell Oil Company* v. *Davidor and Davidor,* et al., 315 P. 2d 259; and *Pannell* v. *Farmers Union Co-op Gin Association,* 192 Okla 652, 138 P. 2d 117, there is a basic constitutional question involved as to whether it's decision to the effect that there is "substantial evidence" in the record to support the order of the Oklahoma Corporation Commission establishing one 320-acre well drilling and spacing unit consisting of the south half of said Section 35 is so wholly and totally erroneous as to be arbitrary, capricious and a violation of petitioner's rights under the 14th Amendment to the Federal Constitution. Exhibit 9A in the record of pro-

ceedings before the Oklahoma Corporation Commission (R. 95) and included in this Petition as Appendix 1(b) shows a general view of development in the area involved, indicating one structure covering portions of Sections 6 and 7 in Township 1 North, Range 10 East, at the extreme south east corner of the area, where four wells have been drilled, two of which were dry holes. The two producing wells shown are in a southeast-northwest trend, and are offset by a dry hole, indicating the trend of the entire area. The squares on Exhibit 9A (Appendix 1(b) hereto) are the equal of 40 acres, and any layman can see that Exhibit 9A is almost conclusive evidence that a very narrow structural trend is involved. Section 1 immediately northwest of the two wells referred to shows the structure to be only one-half mile wide east and west. However, when one turns to the land involved in the subject controversy, it is found that the Corporation Commission extended the structure over an area *one mile wide east and west.* The only well drilled in Section 35 is only 990 feet from the east line. From the location of the well to the west side the unit created by the Commission is a distance of 4,290 feet. By referring back to the first structure indicated hereinabove in Sections 6 and 7, it is virtually conclusive that the structure does not extend east and west over 1,320 feet. (App. 1(b) hereto) Thus, it is graphically illustrated, that the order of the Oklahoma Corporation Commission spacing an area east and west a mile wide, or 5,280 feet, is wholly erroneous and not supported by substantial evidence. Exhibit 9A (R. 96) shows the location of remaining development on this trend in the next structure in this area and immediately north of the land in controversy. Exhibit 9A shows in more detail a fault running generally northwest and southeast right through the middle of the structure. That it is a

well-defined fault is ascertainable from the fact that the wells east of the middle fault encountered the Ordivician, which includes the Basal McLish and the Oil Creek Sands, on the east side of the fault in the range of a minus 4,100 feet, while wells on the west side of this fault encountered the Ordivician at a minus 3900 to 3,960 feet, or a throw of approximately 140 feet.

This evidence leaves no doubt about the separation in the area, and establishes that in fact there are two separate reservoirs located in Sections 27 and 28 of Township 2 North, Range 9 East. The east reservior in Section 27 and the structure east and west is not in excess of one-half mile, and probably does not extend that far. The west reservoir, covering the land in the east half of Section 28, and a part of the lands in the SW/4 of Section 27, is approximately one-half mile east and west. The evidence is clear that the five reservoirs in this immediate area are small, narrow structures, and never exceed more than two 40-acre locations east and west. On Exhibit 9A (App. 1(b) hereto) the evidence is clear that a line commencing in the southeast corner of the exhibit in Section 7 and projected in a straight line running northwest to the areas referred to through the various reservoirs comes extremely close to every producing well in all of the producing reservoirs, and in no case is a producing well more than 40 acres away from the axis created by said straight line, except in the west reservoir in the extreme northern portion of the exhibit. If a straight line is projected through the middle of the west reservoir in this area on the exhibit no well is in excess of 40 acres away from the axis projected by such a line. The evidence is conclusive that these reservoirs are narrow and extend generally only to an area covering two 40 acre tracts east and west, and applied to the

property in controversy herein, it can be seen that the well in the unit created by the Oklahoma Corporation Commission in the present dispute is in the east 40 acres of the unit area. It would appear to be wholly erroneous, unreasonable, and arbitrary in view of the development history of the area, for any fact-finding body to say that in the isolated instance affecting the S/2 of Section 35, that the productive area includes all of the S/2 of Section 35, and extends to and covers the SW/4 of Section 35. Exhibit 10 (R. 97) (App. 1(c) hereto) reveals that Tenneco Oil Company successfully sought to have the reviewing authority believe that all of the S/2 of Section 35 is productive in two reservoirs. The legend attached to the exhibit appears as "integrated, sub-service and seismic structure map top of Booch 3 Sand". The Supreme Court of Oklahoma completely ignored the fact that the word "Booch 3" was pencilled out, and that the words "Oil Creek" were written suspiciously in ink above it in the exhibit. Without inquiry, the Supreme Court of Oklahoma apparently accepted this "altered" Tenneco Oil Company exhibit as locating the structure position of the Oil Creek formation, when it is common knowledge of which the Court could take judicial notice that the Booch formation in this area is several thousand feet above the Oil Creek and is productive of gas, and that there is no relation whatsoever between the Pennsylvanian Booch formation and the Ordivician Oil Creek formation some 4,000 feet deeper. The testimony of the Tenneco Oil Company expert at record pages 37, 39, 40, 42 and 63-65 supports the material referred to hereinabove in Exhibits 9 and 9A (R. 95 and 96). To the extent that the expert witness of the Tenneco Oil Company differed from the position of petitioners' exhibits and witness (R. 54-56) and (R. 46-51), he based his opinion on information contained in seismic re-

ports which he refused to produce (Record 37) (See also Exhibit 10, R. 97). Thus, the Oklahoma Corporation Commission's decision on the record involves ignoring the expert testimony of two experienced oil geologists familiar with the area for 30 years, both of whom produced exhibits and testified that the SW/4 of Section 35 is not underlain by production from the two separate reservoirs in the unit established by the Oklahoma Corporation Commission, and blind acceptance of the one witness of the Tenneco Oil Company who was new in the area and who based his opinion on seismic information which he refused to produce, and which was not subject to cross-examination, and on an Exhibit that on its face had been altered by someone unknown for a purpose unknown and was confusing as to what it purported to show. (Appendix (c) hereto) (R. 37, 58)

Petitioners respectfully submit that on the basis of the whole record neither the Oklahoma Corporation Commission nor the Supreme Court of Oklahoma itself could possibly have determined that there was substantial evidence to support the establishment of one 320 acre well-spacing and drilling unit consisting of the S/2 of Section 35 as outlined hereinabove. Such finding on the basis of the evidence of record was so unreasonable, arbitrary and capricious as to amount to a deprivation of petitioners' property without due process of law, and a denial of equal protection of the law, as guaranteed to them by the 14th Amendment to the Constitution of the United States. Petitioners respectfully submit and verily believe that the Supreme Court of Oklahoma in holding that there was "substantial evidence" to support the Oklahoma Corporation Commission's order in said proceeding was in effect a decision on a Federal question in a way prob-

ably not in accord with applicable decisions of this Court under the due process clause of the 14th Amendment.

WHEREFORE, the premises considered, petitioners respectfully submit that they have set forth hereinabove special and important reasons for the exercise of sound judicial discretion by this Court in reviewing the opinion and decision of the Supreme Court of Oklahoma herein on writ of certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted. There is no avenue of relief from the tainted and erroneous decision of the Supreme Court of Oklahoma violating constitutional rights of petitioners herein except this Court.

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APPENDIX

APPENDIX

VOGEL ET AL.

v.

CORPORATION COMMISSION ET AL.

No. 40526. Feb. 9, 1965.

* * * * * * * * * * *

JOHNSON, J. This is an appeal from an order of the Corporation Commission, creating one drilling and spacing unit consisting of the S-½ of Section 35, Township 2 North, Range 9 East, Coal County, Oklahoma. Such unit was created for the production of natural gas and condensate from the Basal MsLish and Oil Creek Sands.

The plaintiffs in error submit two propositions for the vacation of the order as follows:

"Plaintiffs in error challenge the order of the Corporation Commission as being a violation of their Constitutional rights.

"There is no substantial evidence in the record authorizing the entry of the spacing order."

In Finding No. 5 the Commission made this statement, which summarizes the controversy:

"5. The principal dispute in this cause is whether or not the SW/4 of said Section 35 is underlain by productive Basal McLish and Oil Creek Sands; * * * "

After making a resume of the testimony, the Commission made Finding No. 8 which is as follows:

"8. Taking into consideration all of the evidence, facts and circumstances in this cause, it would appear that some substantial portion of the SW/4 is underlain by these common sources of supply, and therefore an order should be made establishing the S/2 of Section 35 as a drilling and spacing unit for the Basal McLish Sand and for the Oil

Creek Sand, and the Sarkeys No. 1 Well, located in the NW/4 of the SE/4 of the SE/4 of Section 35, should be the permitted well for said unit."

It is this finding to which objection is made.

The argument advanced by appellants in support of Proposition One is that there is a taking of appellants' property in violation of Sections 23 and 24 of Article 2 of the Constitution of Oklahoma and in violation of the 14th Amendment to the Constitution of the United States because there is insufficient evidence "in the record justifying the entry of the order creating drilling and spacing units one mile wide east and west in view of the facts in this case." This quoted language is from the brief of appellants. The claimed violation of appellants' constitutional rights is therefore based upon the same contention advanced in Proposition Two, supra, namely, that the evidence is insufficient to justify the order entered.

We therefore proceed to a consideration of Proposition Two. The entire objection to the order is that there is insufficient evidence to justify the inclusion of the SW/4 of Section 35, and therefore the royalties of the plaintiffs in error would be reduced by approximately forty percent.

It is conceded by both parties that the rule is correctly stated in the case of Mee v. Corporation Commission, Okla., 293 P. 2d 593, from which the following is quoted:

"The rule is well established that if an order of the Corporation Commission appealed from is found to be supported by substantial evidence, it will be affirmed by this Court. The rule is clearly stated in Woody v. State Corporation Commission, Okla., 265 P. 2d 1102, 1106, wherein it is stated in the body of the opinion:

"' • • • • In the orderly administration of law we must indulge the presumption that the Commission's order is just, reasonable and correct.

" • • • •

" 'Our appellate jurisdiction, as applied to the case before us, is judicial only, and is limited to a consideration whether the Commission has legally pursued its authority, and whether its findings and conclusions are sustained by the law and substantial evidence. * * * ' "

This controversy hinges upon the single question of whether there was substantial evidence to support the order entered. The plaintiffs in error contend that there is no substantial evidence to show that there was a probability of production under the SW/4 of Section 35. The precise contention is that the opinions of the Tenneco experts were based wholly upon seismic information which it is said was "questionable," "not substantial" and "not persuasive."

We do not deem it necessary to determine that seismic data of the character introduced is insufficient to sustain the order entered or does not constitute "substantial" evidence within the definition established by our previous opinions. In this case there was *other* evidence.

We quote excerpts from the testimony of the geologist testifying for applicants. After stating that since production could, in his opinion, be had in the SW/4 of Section 35, he pinpointed the sources from which his opinion was formed, as follows:

"Q. What evidence do you have that any part of the Southwest Quarter of Section 35 will be productive? A. It's based on seismic data in the area.

"Q. Is it based entirely on seismic information? A. We also have a knowledge of the producing trend that runs through this area. We are generally looking at a ridge running through the area and we feel that this ridge continues on slightly north of west from the Sarkeys Well in this same section.

" * * *

"Q. (By Mr. Walker) With respect to Exhibit 10, let me ask you what the information is comprised of? I don't even know myself. A. We have the well records of the wells we drilled; we have the logs and the scout tickets of the wells immediately northwest of this area; we also had the seismic records in this area.

"• • • •

"Q. On the Sarkeys Well you have a minus 7489. What is that? A. That's the top of the Oil Creek.

"Q. How did you arrive at the gas-water contact? A. That is based on information on the electric log.

"• • • •

"Q. Does Exhibit 10 bear out that interpretation of the area? A. Yes, sir.

"Q. And based on that, the Southeast Quarter of Section 35 would be wholly underlain by each common source of supply involved which would contribute gas to the well involved? A. It wouldn't be wholly underlain but substantially, yes, sir.

"• • • •"

We have been cited to no authority which holds that seismic data is not sufficient upon which to base an opinion as to the productivity of an area. But if additional information is required, we are of the opinion and hold that the quoted testimony shows additional information upon which the opinion was based.

The quoted evidence is sufficient to come within the rule set forth in Superior Oil Co. v. Oklahoma Corporation Commission, 206 Okl. 213, 242 P. 2d 454, wherein we said in the body of the opinion:

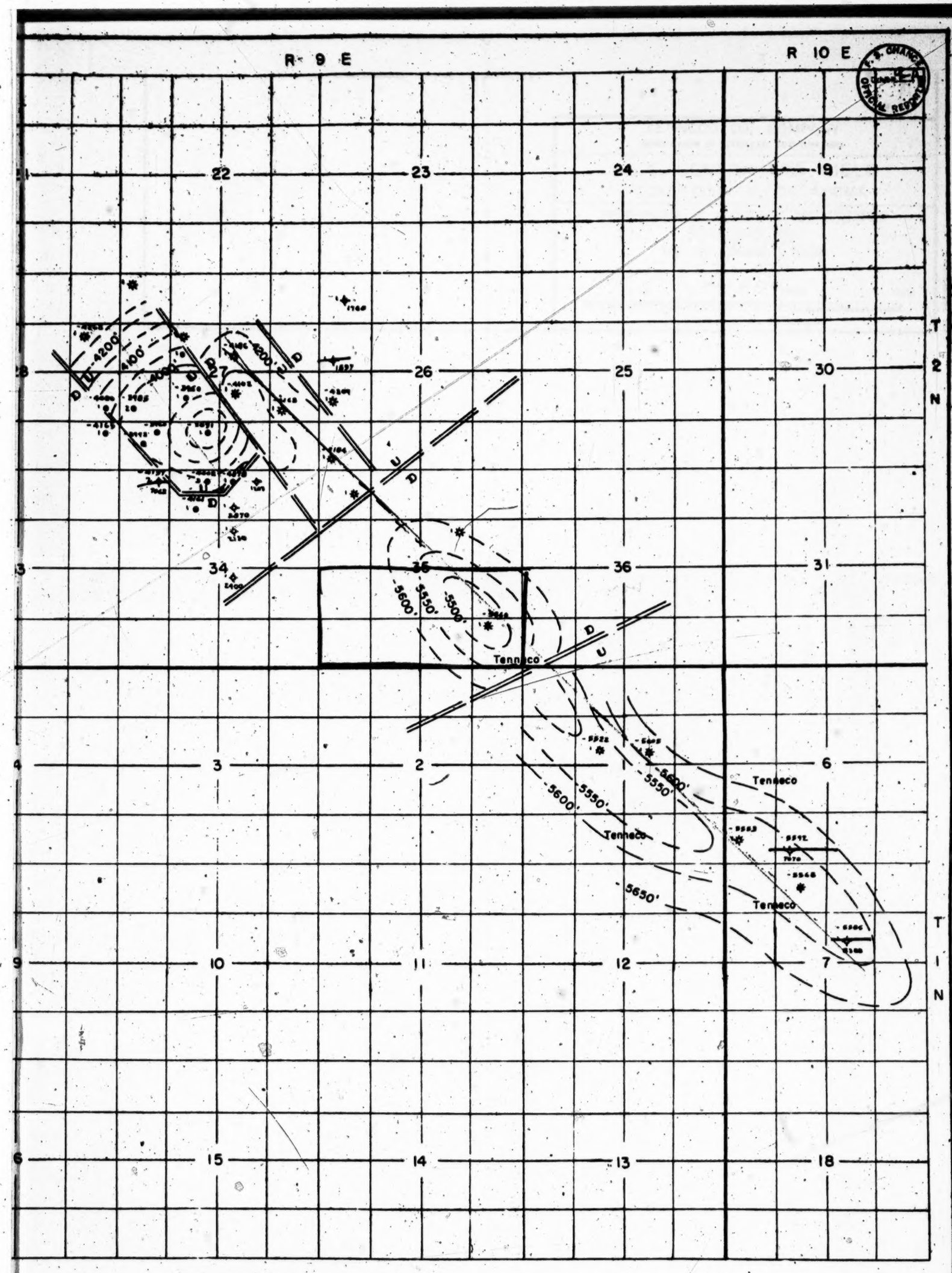
"We concede that the Corporation Commission has a wide discretion in the performance of its statutory duties. We cannot substitute our judgment on disputed questions

of facts unless the findings of the commission are not as commanded by the Constitution, supported by the law, and substantial evidence."

See, also, Pannell v. Farmers Union Cooperative Gin Association of Sterling, 192 Okl. 652, 138 P. 2d 817, Chicago R. I. & P. Ry. Co. v. Vogel, 195 Okl. 194, 156 P. 2d 620; Yellow Transit Co. v. State, 198 Okl. 229, 178 P. 2d 83; Cities Service Oil Co. v. Anglin, 204 Okl. 171, 228 P. 2d 191; Anderson-Prichard Oil Corp. v. Corporation Commission, 205 Okl. 672, 241 P.2d 363; Application of Choctaw Exp. Co., 208 Okl. 107, 253 P. 2d 822; and Application of Bennett, Okl., 353 P. 2d 114.

The order of the Corporation Commission is affirmed.

HALLEY, C.J., JACKSON, V.C.J., and WILLIAMS, IRWIN, and BERRY, JJ., concur. BLACKBIRD, J., dissents.



CENTRAHOMA AREA

COAL COUNTY, OKLA.

DATUM = TOP UNION VALLEY LIME

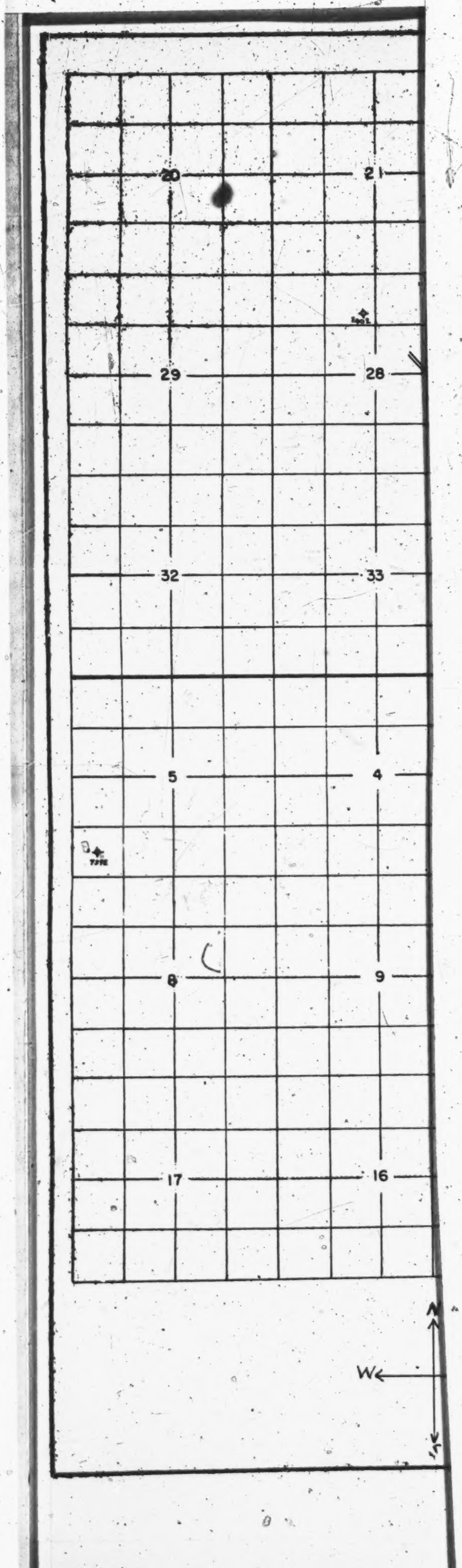
CONT. INT. = 50 FEET

NOV., 1962 ROB'T. L. CASSINGHAM
Geologist

Pet. Ex. 9-A

12" wide

Exhibit 9A 1(b)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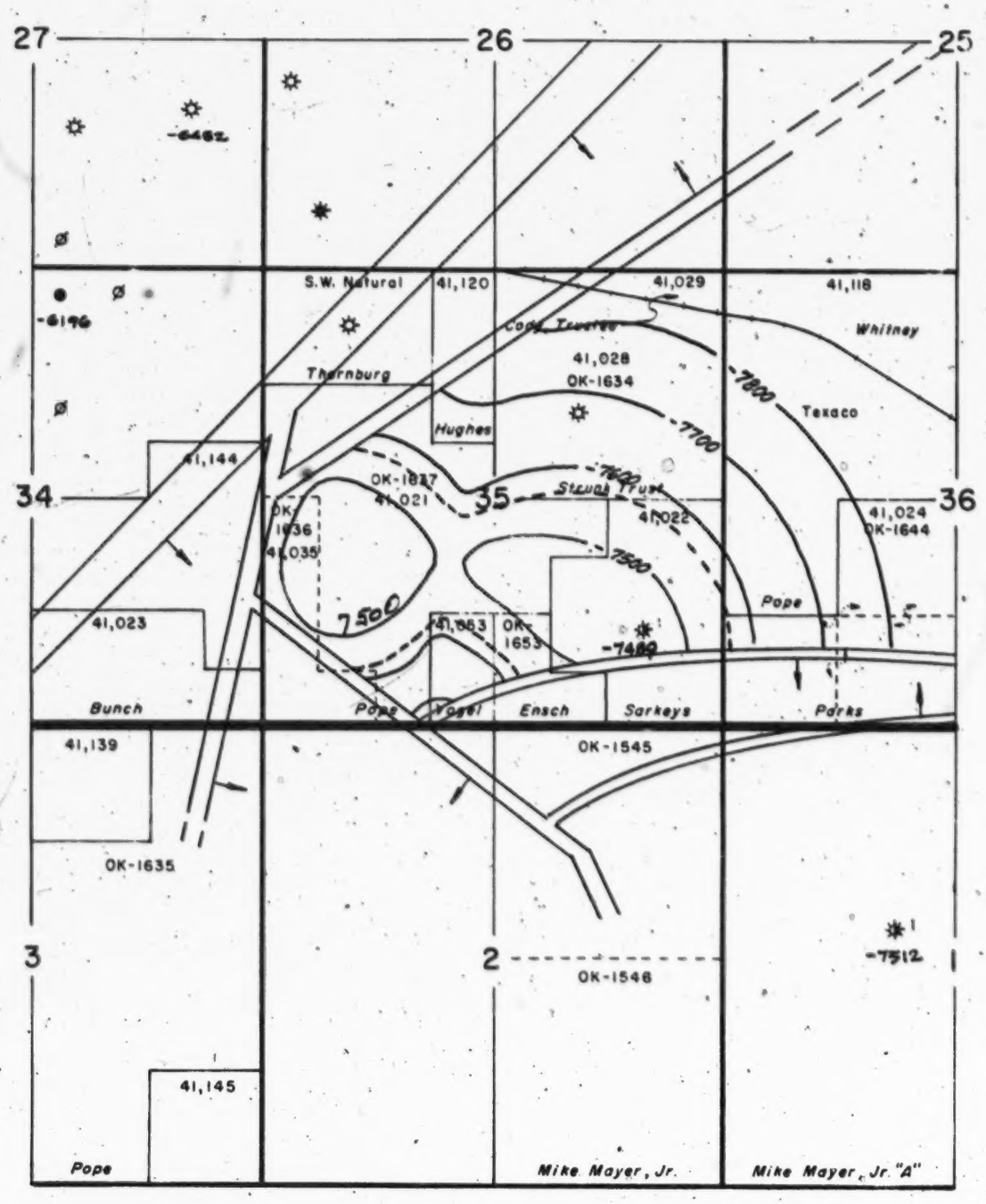

TENNECO OIL COMPANY SUBSIDIARY OF TENNECO CORPORATION
S.E. CENTRAHOMA FIELD COAL COUNTY, OKLAHOMA
INTEGRATED SUBSURFACE AND SEISMIC STRUCTURE MAP TOP OF ~~Booch 3~~ Big Piney SAND C.I.: 100' SCALE IN FEET 2000 1000 0 2000 4000 OKLAHOMA CITY, OKLAHOMA

Exhibit 10 1(c)